No. 14,505

IN THE

United States Court of Appeals

For the Ninth Circuit

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,

Appellant,

vs.

FIDALGO ISLAND PACKING CO.,

Appellee,

CLARA WILSON,

Intervenor.

BRIEF FOR APPELLANT.

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OPINION BELOW.

The opinion of the District Court is reported in 120 F. Supp. 777.

JURISDICTION.

On July 30, 1953, the appellee filed suit to enjoin the enforcement of Benefit Regulation No. 10, which regulation prescribes the seasonal periods for certain cannery employers who were previously determined

to be seasonal under the Alaska Employment Security Law. On April 27, 1954, the new executive director, A. B. Phillips, was substituted as defendant. (R. 45.) On May 12, 1954, the Court caused to be filed its findings of fact and conclusions of law, whereby, among other things, it found that (R. 55):

> (1) Sec. 7(c)(1) of Ch. 99 SLA 1953 requires the Commission to determine as seasonal every employer in Alaska whose payroll experience meets the said section's definition of a seasonal employer;
>
> (2) that the Commission's classification of the plaintiff as a seasonal employer while failing to also classify all other employers in Alaska whose payroll experience met the 7(c)(1) formula constituted unjust discrimination and will cause the appellees irreparable damage, thereby entitling them to a permanent injunction against the enforcement of Regulation No. 10. (R. 201.)

On May 12, 1954, judgment was entered declaring the regulation void and a permanent injunction issued enjoining the appellant from enforcing the same. (R. 65.) An appeal was taken on June 11, 1954, by filing a notice of appeal. (R. 67.) The jurisdiction of the District Court rests on the Act of June 6, 1900, 31 Stat. 322, as amended, 58 USC, Section 101; the jurisdiction of this Court on Section 1291 of the New Federal Judicial Code.

QUESTIONS PRESENTED.

(1) Should an injunction have been issued against the enforcement of Regulation No. 10?

(2) Is the doctrine of exhaustion of administrative remedies applicable?

(3) Did the Court commit reversible error in judicially noting that the Alaskan construction industry, save Ketchikan and vicinity, is seasonal in fact?

STATUTES INVOLVED.

(See Appendix infra.)

STATEMENT.

This action was instituted by appellee, Fidalgo Island Packing Co. on July 30, 1953, to enjoin the enforcement of Benefit Regulation No. 10 and to have the same declared to be null and void for these reasons (R. 12):

(1) the appellant had no power or authority to issue or enforce it;

(2) its enforcement would work irreparable damage to appellee and all others engaged in the canning of salmon in the Territory of Alaska.

Appellee, Clara Wilson, by Court order dated November 28, 1953, was permitted to intervene over the appellant's opposition. Her complaint in intervention prayed for the same relief as sought by appellee, Fidalgo Island Packing Co. (R. 15.)

Appellee, Fidalgo Island Packing Co., is a foregin corporation entitled to do business in Alaska. It cans and packs, for outside distribution and consumption, salmon caught in Alaska.

On June 29, 1953, the said appellee, pursuant to Sec. 7(c)(2) of Ch. 99 SLA 1953, was formally notified in writing that the Commission had determined it to be a seasonal employer. On the face of said notice was the notation that any employer determined to be seasonal has the right, within fifteen days after it received notice thereof, to appeal to the Commission from said determination. (R. 32.) Appellee, though it had actual notice thereof, did not appeal.

On June 29, 1953, Benefit Regulation No. 10 was promulgated, which specified, for only previously determined seasonal employers, the seasonal periods during which unemployment benefits shall be payable to their employees, if unemployed during said seasonal period. (R. 8, 9.)

The District Court granted a preliminary injunction on August 17, 1953, enjoining the enforcement of said regulation. On November 27, 1953, the Court heard extensive arguments in support of defendant's motion for summary judgment. (R. 76-85.) However, the Court never decided the motion. Thereafter, trial on the merits was had on April 27, 28, 29 and May 3, 1954, at which time the parties submitted evidence and offers of proof in support of their respective positions. On May 7, 1954, the Court issued its opinion, holding (R. 42):

(1) Benefit Regulation No. 10 was issued without authority and therefore is void;

(2) That Section 7 of Ch. 99 SLA 1953 required the Commission to seasonally classify every employer in Alaska whose payroll experience met the Sec. 7(c)(1) statutory definition, and the government's seasonal classification of the appellee while failing, at the same time, to classify all other allegedly seasonal employers, constituted unlawful discrimination;

(3) that said failure to classify has caused a serious drain on the fund, which may irreparably damage appellee and intervenor (R. 52), thus entitling them to a permanent injunction.

Finding of fact and conclusions of law were filed in accordance with the Court's opinion (R. 55), and on May 12, 1954, judgment and decree was entered and a permanent injunction issued enjoining the enforcement of Benefit Regulation No. 10. (R. 65-67.)

SPECIFICATIONS OF ERROR. (R. 69.)

I.

The Court erred in holding that the doctrine of exhaustion of administrative remedies should not be applied. This is error since the statute expressly requires an appeal to the Commission after a determination of seasonality and appellee neglected to so appeal.

II.

The Court erred in holding that the authority to determine seasonality was neither delegated nor intended to be delegated. This is error since the statute expressly permits the Commission to delegate its regulation-making authority. Such a delegation was in fact made and Regulation No. 10 promulgated pursuant thereto.

III.

The Court erred in holding that the regulation is inconsistent with the law and that under no circumstances could it ultimately be upheld. This is error since Regulation No. 10 complies with the law in that it specifies the seasonal periods during which benefits shall be payable to certain cannery employees whose employers were previously determined to be seasonal. It was not intended, nor does it attempt, to seasonally classify any employer or industry.

IV.

The Court erred in holding that the statute strips the Commission of all discretion in seasonality classification and constitutes a mandate of law that all employers and employing units be classified as seasonal and nonseasonal. This is error since such an interpretation is contrary to the letter and spirit of the statute, imposes an insurmountable burden on the Commission, makes it administratively impossible to carry out the law and is contrary to long established administrative practice.

V.

The Court erred in finding that the Commission's failure to classify the construction industry is the largest factor contributing to the fund's depletion. This is error since there is not one scintilla of proof establishing a causal connection thereby.

VI.

The Court erred in taking judicial notice that the entire construction industry in Alaska, except Ketchikan and vicinity, is seasonal in fact. This is error because the Court invaded an area reserved exclusively to the Commission and arbitrarily found as a fact a matter open to serious dispute.

VII.

The Court erred in rejecting the appellant's offer of proof relative to seasonality in the construction industry. This is error since, if accepted, it would have shown that previous Commissions determined that there exist adequate grounds for not classifying the construction industry as seasonal.

VIII.

The Court erred in holding that appellee and intervenor would be irreparably damaged and discriminated against by the enforcement of Regulation No. 10. This is error since appellee, qua appellee, cannot be damaged by the enforcement of the regulation. Appellee can be the champion only of its own rights and therefore is precluded from asserting the

rights, if any, of its employees. The only conceivable discrimination, if any, is against appellee's employees, not against appellee. The intervenor, since not a seasonal employee, can in no way be injured by the enforcement of the regulation.

FINAL ISSUES.

The specifications of error (R. 69) may be grouped, for purposes of simplifying argument, into three questions, which therefore become the main issues in this case.

Issue I.

Should an injunction have been issued under the facts of this case? (Errors No. 5 and 8.)

Issue II.

Does the doctrine of exhaustion of administrative remedies foreclose appellee's right to judicial relief? (Errors No. 1, 2, 3, 4 and 7.)

Issue III.

Did the Court commit reversible error in taking judicial notice that the Alaskan construction industry, save Ketchikan and vicinity, is seasonal in fact? (Error No. 6.)

SUMMARY OUTLINE OF ARGUMENT AND AUTHORITIES.

Issue I.

An injunction should not have been issued against the enforcement of Regulation No. 10.

Point 1.

Appellee has not been threatened with irreparable damages because of the promulgation or enforcement of Regulation No. 10.

Eccles v. Peoples Bank, 333 US 426, 431.

Point 2.

The appellee specifically requested that the seasonal periods during which benefits shall be payable be coordinated with the open seasons set by the Fish and Wildlife Service Regulations.

Point 3.

The only possible injury, if any, would be to appellee's seasonal employees and not to the appellee as an employer.

Sheldon v. Griffin, 174 F. 2d 382, 384;
Hess v. Mullaney, 213 F. 2d 635, 640;
Jeffrey Mfg. Co. v. Blagg, 235 US 571, 576.

Point 4.

Possible higher contributions by employers in lieu of credit ratings not an element of irreparable damages.

Section 51-5-5(c) ACLA 1949.

Point 5.

Resident salmon industry employees are put in a favored class, not discriminated against, by the enforcement of Regulation No. 10.

Point 6.

Intervenor Wilson as a non-seasonal employee was not injured.

Chapter 99 SLA 1953;

Sec. 5, Ch. 99 SLA 1953.

Issue II.

The exhaustion of administrative remedies doctrine applies herein.

Point 1.

Chapter 99 requires that administrative appeal be taken within 15 days after a determination of seasonality. Appellee's failure to so appeal should preclude injunctive relief.

Sec. 7(c)(2) of Ch. 99 SLA 1953;

Sec. 51-5-7(h) ACLA 1949;

Myers v. Bethlehem Shipbuilding Corp., 303 US 41;

Abelleira v. District Court of Appeal, 109 P. 2d 942, 949;

Oklahoma Welfare Comm. v. State, 105 P. 2d 547;

Lichten v. Eastern Airlines, 189 F. 2d 939, 25 ALR 2d 1337 (1951);

United Fuel Gas Co. v. Railroad Comm., 278 US 300, 309-310;

Miles Laboratories v. Fed. Trade Comm., 140 F. 2d 683, 685;

La Verne Co-op. Citrus Ass'n v. U. S., 143 F. 2d 415, 419 (9th CCA);

Chicago v. O'Connell, 8 ALR 916, 919;
Smith v. Duldner, 175 F. 2d 629, 631.

The following is an analysis of the four reasons the trial Court gave in support of its holding that the exhaustion doctrine should not be applied, i.e.:

(1) That the determination of seasonality was neither delegated nor intended to be delegated;

(2) that the regulation is invalid because:

(a) the statute requires the Commission to pass upon the seasonal status of all employers, and if anyone meets the statutory definition he must be classified. (R. 50.) Regulation 10 did not so classify all employers;

(b) the regulation classifies employers on an industry-wide in lieu of an individual basis. (R. 50);

(c) the regulation was adopted without notice and without an opportunity to be heard (R. 51);

(3) that the possibilty of a deadlocked Commission is relevant in this case (R. 51);

(4) the remedy sought is judicial rather than administrative (R. 51).

Reason No. 1: Was the executive director vested with delegative authority to make a determination and issue a seasonal regulation?

Sec. 51-5-1(f) ACLA 1949;
Sec. 7(c)(2) Ch. 99 SLA 1953;

Ch. 82 SLA 1953;

Ch. 83 SLA 1953;

P. 847-850, 1953 Sen. Journal, 58th day (message from Governor of Alaska vetoing House Bills 128 and 129, regarding Alaska Employment Security Commission);

P. 851, 1953 Sen. Journal, 58th day (message from House stating it had passed both bills);

P. 923, 1953 Sen. Journal, 60th day (Bill No. 128 passed by Senate);

P. 923, 924, 1953 Sen. Journal, 60th day (Bill No. 129 passed by Senate);

50 *Am. Jur.,* Statutes, p. 538, Sec. 533;

Bear Lake & R. W. & I. Co. v. Garland, 164 US 1, 11, 12;

Pacific Mail S. S. Co. v. Joliffe, 69 US 2 Wall. 459 (7.808);

Posadas v. National City Bank, 296 US 497, 505;

State Tax Comm. v. Katsis, 90 Utah 406, 62 P. 2d 120, 107 ALR 1477, 1480.

Reason No. 2: Is the regulation invalid?

(a) Does the statute require the Commission to pass upon the seasonal status and require that seasonal periods be set for all employers?

Sec. 7(c)(1) Ch. 99 SLA 1953;

Sec. 51-5-2(c) ACLA 1949;

Ch. 4 SLA 1937 (Extraordinary Session), Section 3(c)(1) thereof;

Ch. 1 SLA 1939, Section 12 thereof;
42 *Am. Jur.,* Pub. Adm. Law, Sec. 77, 78.

(b) Does the regulation classify the salmon industry employees on an industry-wide in lieu of an individual employer basis?

Sec. 7(c)(2) Ch. 99 SLA 1953.

(c) Was Regulation No. 10 adopted without notice and without affording the appellee an opportunity to be heard?

Sec. 51-5-11(b) ACLA 1949.

Reason No. 3: Is the possibility of a deadlocked Commission relevant on the question of the exhaustion doctrine's application?

Oklahoma Pub. Welfare Comm. v. State, 105 P. 2d 547, 551;
Abelleira v. District Court of Appeal, 109 P. 2d 942, 953;
P. 921, 922, Sen. Journal, 21st Sess., 60th day, Alaska Leg.

Reason No. 4: Is the matter of the remedy sought herein judicial rather than administrative?

39 Cornell Law Quarterly, 273, 283, 285, 286;
Gonzales v. Williams, 192 US 1;
U. S. v. O'Donovan, 178 F. 2d 876;
Briener v. Wallin, 79 F. Supp. 506, 507, 508;
Ex Parte Fabiani, 105 F. Supp. 139 (E. D. Pa., 1952);
United Fuel Gas Co. and *Wallin* cases, supra;
Sec. 7(c)(2) Ch. 99 SLA 1953;
Sec. 7 Ch. 99 SLA 1953;

42 *Am. Jur.,* Pub. Adm. Law, Sec. 201;
Oklahoma Pub. Welfare Comm. v. State, 187 Okla. 654, 105 P. 2d 547.

Issue III.

The trial Court committed prejudicial error in judicially noting that the Alaskan construction industry is seasonal, save Ketchikan and vicinity.

Point 1.

The prerequisites for judicial notice were not fulfilled.

20 *Am. Jur.,* Evidence, Sec. 17.

Point 2.

Appellant's offer of proof, if accepted, would have shown that all of the construction industry is not in fact seasonal and that there are good and sufficient reasons why a sizeable portion of said industry should not be seasonally classified.

ARGUMENT AND AUTHORITIES.

ISSUE I.

AN INJUNCTION SHOULD NOT HAVE BEEN ISSUED AGAINST THE ENFORCEMENT OF REGULATION NO. 10.

Point 1.

Appellee has not been threatened with irreparable damages because of promulgation or enforcement of Regulation No. 10.

The appellee's contention as to how it is being threatened with irreparable damage is set forth on

pages 3 and 4 of its April 27, 1954, brief filed in the District Court:

> "We state these facts to show that the fund is in serious danger of depletion. In fact, the record shows that the fund now has, at the end of March 1954, less than 50% of the amount it had at the end of December 1948 (App. vi), and where employers are paying into a fund for unemployment insurance for its employees and the fund is being so rapidly depleted, the contributors are bound to suffer irreparable injury and the employees are bound to suffer irreparable injury under the law, for Section 51-5-2 ACLA 1949 provides that when the amount of the reserve goes down to $2,000,000, the benefits to unemployed are automatically decreased by almost 50%. This alone illustrates the irreparable injury to both employer, Fidalgo Island Packing Company, and to the intervenor, Clara Wilson, who is an employee. This argument applies to all employers and contributors to the fund in the territory."

The District Court apparently was persuaded by the appellee's fund-depletion argument as stated above. The following is the Court's statement as to why it held that the appellee was irreparably damaged:

> "The claim of irreparable injury is based, in the main, on the progressive diminution of the fund, which in turn will require greater contributions by, and the loss of credit ratings to, the employer, and decreased benefits to the employee.
>
> "The failure to classify the construction industry as seasonal is undoubtedly the largest contributing factor in the process of depletion . . .

> "As between resident and nonresident workers in the canned salmon industry, the resident may receive benefits only if unemployed during the period referred to, whereas the nonresident is not so limited."

It is apparent, therefore, that the Court issued an injunction primarily on the ground that the fund's balance is diminishing.

To grant an injunction against a regulation which was designed to protect the fund by restricting payments therefrom, while stating at the same time that the reason for the injunction is to protect the fund, is indeed an anomalous twist of logic. If the trial Court's decision nullifying the regulation is not set aside, there will be a further one-half million dollar drain on the fund. If the decision is reversed, $650,000.00 will be credited to the fund's balance. (R. 73 and 75.)

It is difficult to understand how the trial Court, which is gravely concerned about the rapid depletion of the fund, could issue an injunction, the direct cause of which would further deplete the fund.

Appellee, in answering defendant's requests for admissions, admitted that if Regulation 10 is nullified the fund would become further depleted:

> ". . . and probably if it is not enforced and no other regulation is adopted . . . benefits may be payable over a 52-week year, thereby quickly depleting the fund." (R. 36.)

There is no connection between the promulgation of the regulation and the alleged depletion of the

fund. The District Court has voided the regulation not because its enforcement depletes the fund, but because of the Commission's "failure to classify the construction industry . . ." (R. 52.) It appears that the appellee has pursued an improper remedy, if indeed it is entitled to any. The nullification of Regulation No. 10 will in no manner preserve the fund. Quite the contrary, it manifestly subjects it to further exhaustion. (R. 35, 36.)

Appellee brought suit to enjoin Regulation No. 10 on July 30, 1953. The short period of time between the effective date of Section 7 of the Act April 1, 1953, and July 30, 1953, is not sufficient time to give the Commission the opportunity to investigate the seasonality status of every employer in Alaska so as to obviate the charge of discrimination against the canned salmon industry. (R. 242-244.) Neither the appellee nor the District Court has given the new Commission, which first met in August of 1953, the opportunity to pass upon the seasonality problem. Instead, the appellee filed a premature law suit and further aggravated the seasonality problem.

Upon the highly speculative ground that the fund may be depleted (not because of the enforcement of Regulation No. 10) and because the construction industry was not classified on or before July 30, 1953, the District Court granted injunctive relief to a private corporation as against a public regulation designed to protect the trust fund.

The Supreme Court has ruled that an injunction should not issue against a public agency as against a

private person unless the need for same is clear and not remote or speculative. *Eccles v. Peoples Bank,* 333 US 426, 431.

Point 2.

Appellee specifically requested that the seasonal periods during which benefits shall be payable be coordinated with the open seasons set by Fish and Wildlife Service Regulations.

Mr. Gilmore, representing Alaska Salmon Industry, Inc., an association of non-resident salmon packers of which appellee is a member, conferred with Mr. McLaughlin, former executive director and initial defendant herein, prior to the issuance of Regulation No. 10. Mr. Gilmore specifically requested that the benefit periods in the regulation be coordinated with the open fishing seasons set by Fish and Wildlife Service regulations. (R. 217, 218.) This request was honored. Since then, however, appellee has reversed its position and now contends that the setting of the benefit seasons in Regulation No. 10 in accordance with Fish and Wildlife Service open seasons is:

> ". . . not according to the actual experience of the employer during the previous year, but they are set on an area basis, using the salmon fishing seasons of the U. S. Fish and Wild Life Service as a guide, even though these seasons fluctuate and the Fish and Wild Life Service may change them at any time and either shorten or lengthen them, and thereby destroy all conformity with the Unemployment Commission regulation.
>
> "Furthermore, by fixing seasons which are not correct, and which do not reflect the true salmon fishing season, the disputed regulation subjects plaintiff to the payment of considerable sums in

> the way of contributions for which neither it nor its employees can obtain any benefits." (Pages 11 and 12 of plaintiff's brief of Jan. 6, 1954, filed in District Court.)

Appellee should be estopped to impeach the very action it requested. Even if the appellee did not request what was actually done, the agency's decision to correlate the benefit seasons with Fish and Wildlife Service open seasons is based upon a reasonable exercise of judgment which should not be set aside.

Point 3.

The only possible injury, if any, would be to appellee's seasonal employees and not to the appellee as an employer.

If the District Court's decision nullifying Regulation No. 10 is sustained, appellee, qua appellee, will in no way be affected thereby; furthermore, approximately $500,000 in benefits would be paid *to appellee's seasonal employees,* not to the appellee-employer.

It is well established that a suitor may champion only its own rights and not the rights of others. *Hess v. Mullaney,* 213 F. 2d 635, 640; *Sheldon v. Griffin* (9th CCA), 174 F. 2d 382, 384. It is observed herein that *no seasonal employee* or group of employees is complaining about the enforcement of Regulation No. 10. Particularly in point is the case of *Sheldon v. Griffin, supra,* where this Court made the following statement relative to a plaintiff who had not suffered a direct injury as a result of action taken by the Alaska Employment Security Commission giving effect to a new Territorial statute:

> "There is nothing in the pleadings or proof to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. To entitle himself to be heard, he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people." (Citing numerous cases.)

In *Jeffrey Mfg. Co. v. Blagg,* 235 US 571, 576, the Court said:

> "Much of the argument is based upon supposed wrongs to the employee . . . No employee is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of."

In the case at bar, the appellee was not, nor is, threatened with immediate, direct damage as the result of the enforcement of Regulation No. 10. Only seasonal employees and not the cannery operators will benefit from the nullification of Regulation No. 10, and only bona fide seasonal employees will be restricted to the reception of unemployment benefits if the regulation is declared valid.

Point 4.

Possible higher contributions by employers in lieu of credit ratings not an element of irreparable damages.

(a) *Higher Contributions.*

It is sheer speculation to argue that higher contributions will be required of employers if Regulation No. 10 is not declared void. Surely such contributions, even if required, will not be caused by the enforcement of Regulation No. 10. The very purpose of restrictive Regulation No. 10 is to protect the fund, thereby causing a reduction in taxes, if anything. Only the legislature can raise or lower taxes. To issue an injunction based upon such a highly speculative ground appears to be erroneous.

(b) *Loss of Credit Ratings.*

Under Section 51-5-5(c) ACLA 1949, when the ratio of reserves to taxable payrolls amounts to 10.8%, a surplus is declared. This means that employers who have good employment experience are awarded credits, the net effect of which is to reduce the amount of tax they are required to pay. Following 1946 and beginning with the fiscal year July 1, 1947, due to the healthy balance of the fund, credit ratings in lieu of taxes were issued to the employers. Awarding such credits naturally decreased the fund's balance. The last experience credit ratings were issued for the period up to June 30, 1952. It is Mr. McLaughlin's testimony (R. 125) that the payment of these credits, in addition to the substantial benefits paid to all classes of unemployed during 1952-1953 and not merely the failure to classify the construction

industry employers, contributed to the fund's depletion. However, the District Court has accepted the appellee's argument that Regulation No. 10 should be voided, not because its enforcement will deplete the fund (quite the contrary), but for what appears to be an irrelevant reason, namely, that the construction industry employers were not seasonally classified. We can conceive of no causal connection between the enforcement of the regulation and the fund's steady depletion. Appellee's primary complaint is not against what was done, but only against what was not done between April 7 and July 30, 1953. The enforcement of Regulation No. 10 caused appellee no additional expenses or administrative burdens. (R. 133.) Instead it has increased the possibility of receiving credits. (R. 144, 152, 154.)

Point 5.

Resident salmon industry employees are favored, not discriminated against by the enforcement of Regulation No. 10.

Only wages earned in Alaska are considered in determining benefits. (R. 134.) Hence, resident Alaskans, far from being discriminated against, are, if anything, favored by Regulation No. 10, since residents have greater opportunities than non-residents to earn more wages in Alaska over a twelve-month period and thus achieve the more favorable non-seasonal status. (R. 135, 136.)

Point 6.

Intervenor Wilson as a non-seasonal employee was not injured.

Intervenor Wilson is forced to admit that, as a non-seasonal employee, the enforcement of Regulation

No. 10 would in no way injure her. This is evidenced by the following statement found on page 6 of plaintiff's brief of April 27, 1954, filed in the District Court:

> ". . . since she was now employed in a laundry she would probably be taken out of the seasonal class and placed in the non-seasonal class and, therefore, *she will no longer be injured* by the fact that the seasonal regulation, as applied to her, is unrealistic. However, the record shows on its face that she is irreparably injured if the provisions of Chapter 99 of the Laws of 1953 are not enforced." (Italics supplied.)

This startling admission that the intervenor will no longer be injured by the enforcement of Regulation No. 10 eliminates all possible grounds justifying an injunction against the enforcement of Regulation No. 10 in favor of the intervenor. The intervenor has frankly admitted that the enforcement of Regulation No. 10 in no way causes irreparable damage but that the alleged failure of the Commission to carry out the provisions of Chapter 99 between June 24, 1953, and July 30, 1953, is the factor that is threatening irreparable damage. However, the trial Court ruled that intervenor was irreparably damaged, based upon the following grounds:

> "It appears, therefore, that although the plaintiff is required to contribute proportionately to the . . . Fund, the fund is disbursed largely for the benefit of those who become entitled to disproportionate benefits solely by reason of being treated as non-seasonal when in fact their employment is seasonal, and that the payment of such benefits is

causing the depletion of the funds, to the prejudice of the plaintiff and intervenor." (R. 53.)

Thus it can be seen that the Court has accepted the appellee's irrelevant and erroneous contention that the failure of the Commission to classify other allegedly seasonal employers has caused the depletion of the fund to the prejudice of the plaintiff and the intervenor. The fund's balance as of April 24, 1954, was $4,380,000.00. (R. 44.) Section 5 of Chapter 99 SLA 1953 establishes a $2,000,000 base, below which benefits shall not be paid which shall exceed twenty dollars a week. Thus the Court's position is that, in the years to come, the fund may be depleted to $2,000,000 because of the Commission's failure to classify the construction industry and therefore possibly reduce intervenor's potential benefits to a figure below $20 a week.

The extreme remoteness of such a possibility is indeed an unsatisfactory ground upon which to issue an injunction against a beneficial public regulation.

ISSUE II.

THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE APPLIES HEREIN.

Point 1.

Chapter 99 requires that administrative appeal be taken within 15 days after a determination of seasonality. Appellee's failure to so appeal should preclude injunctive relief.

Section 7(c)(2) of Chapter 99 SLA 1953 states, in part:

"Prior to June thirtieth each year, a written determination declaring the employer to be seasonal and specifying the period of seasonal operation shall be forwarded to the employer involved. Notice of the determined season shall be forwarded to any representative of individuals in the employment of such employer and of whom the Commission has knowledge. Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party may appeal from such determination . . . the Commission may affirm, modify, or set aside such determination, and such action of the Commission shall be deemed conclusive unless further appeal is initiated as provided in Section 51-5-7(h) herein."

Section 51-5-7(h) states:

"Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final thirty days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act."

Appellee was individually determined to be a seasonal employer and was personally notified of that fact in writing. (R. 32.) On the face of the written notice, which the appellee admitted it had received, was this warning:

". . . this determination shall become final unless the employer or other interested party shall appeal to the Commission (stating therein why the

determination is appealed), within 15 days." (Defendant's Exhibit "B".)

Appellee did not so appeal (R. 33). Instead, on July 30, 1953, the appellee filed this suit for an injunction. This premature resort to the Courts appears to be fatal. *Myers v. Bethlehem Shipbuilding Corp.,* 303 US 41; *Abelleira v. District Court of Appeals,* 109 P. 2d 942, 949; *Oklahoma Pub. Welfare Comm. v. State,* 105 P. 2d 547. The authorities further hold that where a statute expressly directs an administrative appeal as a condition to judicial relief, remedy by mandamus will be expressly denied. *Lichten v. Eastern Airlines,* 189 F. 2d 939, 25 ALR 2d 1337 (1951). The appellee gave the following reasons, unsupported by a single authority, for not appealing the seasonality classification to the Commission:

> "We grant that where there is an administrative remedy provided in the law an aggrieved party must exhaust that remedy before coming into a court of equity . . . but none of the cases he cited deals with an action brought to declare an order or regulation to be void when made by one wholly without authority." (Page 5 of Appellee's Brief of November 28, 1953, filed in the District Court.)

This reason for short-circuiting administrative procedure is insufficient in law. The rule appears to be that even when it is contended that a regulation is made without authority, the administrative remedy must be exhausted. *United Fuel Gas Co. v. Railroad Comm.,* 278 US 300, 309-310; *Miles Laboratories v. Fed. Trade Com.,* 140 F. 2d 683, 685; *La Verne Co-op.*

Citrus Ass'n v. U. S., 143 F. 2d 415, 419 (9th CCA); *Chicago v. O'Connell*, 8 ALR 916, 919; *Smith v. Duldner*, 175 F. 2d 629, 631.

Appellee advanced three reasons why it thought the doctrine should not be applied to this case (R. 33):

(1) appellant's authority to promulgate regulations had expired, thus the regulation was void;

(2) there was no Commission to appeal to;

(3) an appeal would have been futile, since the Commission became deadlocked by reason of a tie vote on every major issue.

The trial Court specifically rejected each and every one of these reasons in the following language:

"The last contention may be disposed of by the observation that the application of the doctrine does not depend on what may be said in retrospect. Here, as in analogous situations, diligence is the criterion. The remaining contentions are in my opinion untenable for, apparently, the new members of the Commission had qualified, and in any event an appeal may be prosecuted although the appellate tribunal is not in session.

"But although these contentions would ordinarily be without merit, they may yet be considered in determining whether the circumstances of this case are such as to warrant the conclusion that the doctrine should not be applied." (R. 48.)

The Court thereupon advanced the following four reasons in support of its holding that the doctrine should not be applied (R. 50, 51):

(1) that the director issued a regulation pursuant to a power delegated to him that was non-delegable in nature;

(2) that the regulation is invalid since

(a) it selects one seasonal industry and fixes the seasonal periods therefor, whereas the law requires the determination of seasonal periods for all employers;

(b) it classified salmon industry employers on an industry-wide in lieu of an individual employer basis;

(c) it was adopted without notice and afforded appellants no opportunity to be heard;

(d) it is discriminatory in its application and operation;

(3) that the Commission is deadlocked on all major issues;

(4) that the remedy is judicial rather than administrative.

The Court cited no authorities in support of its first three reasons. A law school review was cited in support of the fourth.

It is appropriate to analyze and determine the validity of these four reasons:

Reason No. 1: Was the executive director vested with delegative authority to make a determination and issue a seasonal regulation?

In support of a negative answer to this question, the Court stated that the determination of seasonality and

issuance of a regulation setting the seasonal periods are non-delegable powers, and therefore, "It is inconceivable that the exercise of this function would be delegated." (R. 50.)

It appears, however, that the legislature intended the power to be delegated. That a delegation was intended to be made in the first instance is borne out by Section 7(c)(2) of Chapter 99 which provides, in part, that:

> "An appeal shall be made *to the Commission* stating therein why the determination is appealed." (Italics supplied.)

This section implies that the original determination may be made by someone other than the Commission, i.e., the executive director.

It is therefore appropriate at this junction to trace the executive director's authority to make a seasonal classification and thereafter issue a regulation setting the benefit periods.

Section 51-5-1(f) ACLA 1949 states:

> " 'Commission' means the Unemployment Compensation Commission established by this Act *or any person to whom this Commission may delegate its powers and duties.*" (Italics supplied.)

In view of the Territory's immense geographical area, it is understandable why the legislature empowered the Commission to delegate its authority. The meetings of the Commission are many months apart. It relies heavily on the full-time administrative staff, which gathers all statistical data and actually prepares

the Commission's own reports. The legislature recognizes the fact that the executive director must have such delegated authority if the agency is to function (R. 156 and 157).

On November 12, 1938, the Commission made the following delegation of authority to its executive director:

> "Regulation 16, wherein power was granted to the Director to make rules and regulations when the Commission is not in session, was adopted. Such rules and regulations are to be in effect in the regular procedure until such time that the Commission at their next meeting either approves or disapproves such rules and regulations." (R. 161 and 162.)

This delegation was in effect at the time Benefit Regulation No. 10 was issued. The 1938 delegation of authority was exercised on numerous occasions for 15 consecutive years. The Commission immediately preceding the present Commission expressly requested its then acting executive director to promulgate the regulation in dispute in the event the legislature enacted Chapter 99. These instructions were obeyed. (R. 155-157.)

Appellee makes no attack upon the validity of Section 51-5-1(f), which authorizes the Commission to "delegate its powers and duties." A delegation was in fact made. The executive director had to promulgate a seasonal regulation on or before June 30th or forever forfeit the possibility of having a seasonality regulation for the next year. (R. 157, 175.) Rather than

further contribute to the depletion of the fund, Regulation No. 10 was issued.

Section 7(c)(2) requires that a written determination be forwarded to the employer prior to June 30th each year. The new Commission did not meet until August, which means, of course, that if the executive director had not issued Regulation No. 10, there would not have been any seasonality regulation for the forthcoming year, thereby opening the fund to $491,947.00 in claims that would not otherwise be paid. (R. 190.) The new Commission subsequently met on numerous occasions and did not approve or disapprove appellant's action in promulgating Regulation No. 10.

The 1938 delegation of authority to the executive director was his authority to act in behalf of the commission to make initial seasonal classifications and to issue Regulation No. 10.

(a) *The doctrine of simultaneous repeal and reenactment.*

It is argued that any delegation made by a previous Commission terminated with the enactment of Chapter 82 SLA 1953. The appellee further argued that there was "no authority in the defendant at the time to promulgate any regulation." (Page 8 of plaintiff's Brief of April 27, 1954, filed in the District Court.) The Court sustained this position (R. 64).

This argument and holding warrants close analysis. Chapter 82 SLA 1953 states:

> "That Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-

> 5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska 1949, be and it is hereby repealed."

A comparison of these repealed sections with those re-enacted by Chapter 83 discloses not only a marked similarity in wording but the identical paragraph and sub-paragraph numbers were re-employed. (App. "E" and "F".)

Chapters 82 and 83 (House Bills 128 and 129) were passed within minutes of one another. (Pages 923 and 924 of the 1953 Senate Journal, 60th day.)

In view of these facts, the doctrine of simultaneous repeal and reenactment applies. In 50 Am. Jur., Statutes, Sec. 533, page 538, it is set forth as follows:

> "The prevailing view, however, is that where a statute is repealed and all, or some, of its provisions are at the same time re-enacted, the re-enactment is considered a re-affirmance of the old law, and a neutralization of the repeal, so that the provisions of the repealed act which are thus re-enacted continue in force without interruption, and all rights and liabilities incurred thereunder are preserved and may be enforced." (See also Sec. 555 of the same volume and section.)

A leading case, *Bear Lake and River Waterworks and Irrigation Co., et al., v. Garland, et al.,* 164 US 1, 11, 12, presents a striking analogy in principle to the case at bar. There under the Utah Mechanics' Lien Statute of 1888, a claimant was required to commence an action to foreclose his lien within ninety days. The

1890 statute enlarged this time to one year, and expressly repealed the 1888 statute. Much of the claimant's work was done while the 1888 law was in force. He brought his action to foreclose, not within the ninety days allowed by the 1888 statute, but within the year allowed by the 1890 statute.

The Supreme Court of the United States at 164 US 11, 12, made the following observation:

> "Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many case the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in *Pacific Mail S.S. Co. v. Joliffe,* 69 U.S. 2 Wall. 459 (7:808). In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the Court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and re-

enacting the same as a new and original act." In accord, *Posadas v. National City Bank,* 296 US 497, 505.

Applying the Supreme Court's decision herein, the executive director's authority to promulgate Regulation No. 10 in behalf of the Commission was not abrogated by the repealing statute, Chapter 82 SLA 1953. It follows, therefore, that the director had authority to issue the regulation on June 29, 1953.

(b) *Territorial law authorizes the Commission to delegate discretionary power to its executive director.*

The trial court stated, relative to the delegation of authority, that: "Under the authority delegated, the defendant assumed the exercise of what appears to be a *discretionary power.*" (R. 49.) (Italics supplied.) The Court's contention that the appellee illegally exercised a discretionary power fails to withstand analysis.

The power to determine the seasonality status of employers within the statutory definition is a function that can be delegated. If the legislature itself can delegate to the Commission the authority to determine seasonality, it also has the authority to authorize the same Commission to re-delegate the same power to its full-time executive director. *State Tax Commission v. Katsis,* 90 Utah 406, 62 P. 2d 120, 107 ALR 1477, 1480. That is precisely what the legislature did herein. By enacting Chapter 99, it authorized the Commission to determine seasonality. Existing statutes also authorized the Commission to delegate its regulation-making

authority (Sec. 51-5-1(f)). The Commission in fact delegated it. These series of events constitutes the foundation of the appellant's chain of authority to make a seasonal determination and issue a seasonal regulation.

Reason No. 2: The alleged invalidity of the regulation.

The trial Court gave three specific grounds in support of its holding that the regulation is invalid (R. 50, 51):

(1) the law requires the determination of a seasonal period for all employers; since appellee alone was selected, the regulation is discriminatory in its operation and application;

(2) there was an industry or area classification in lieu of an employer classification as required by law;

(3) Regulation No. 10 was adopted without notice.

I. *Does the statute require the Commission to pass upon the seasonal status of all Alaskan employers and require that seasonal periods be set for each?*

The trial Court asserted that Regulation No. 10 is discriminatory in its operation, in favor of the construction industry, because:

> ". . . it is inconsistent with the law under which it was purportedly made because it selects one seasonal industry and fixes the seasonal periods therefor, whereas the law requires the determination of seasonal periods for all employers, and hence, is discriminatory in its application and operation." (R. 51.)

The Court further stated:

> "Although it can hardly be said that Regulation No. 10 is discriminatory on its face, it is clear that, being limited to only one of the many seasonal industries, its operation and enforcement result in discrimination against all employers in the canned salmon industry and their employees. *The law clearly requires the classification of employers as seasonal or non-seasonal, and it is not perceived how the law could operate fairly or uniformly until this is done.*" (R. 52.) (Emphasis supplied.)

The following is the appellee's interpretation of Section 7(c)(1) of Chapter 99, as set forth on page 8 of its Brief of January 8, 1954, filed in the District Court:

> ". . . a formula is set forth in Section 7, Subdivision (c)(1) for the classification of employers.
>
> "The Commission itself has no option in the matter now, but under the new law must classify employers themselves as seasonal or nonseasonal, and this is not done by industries as heretofore."

On April 29, 1954, after trial, the appellee amended its complaint as follows, to allege the newly asserted discrimination theory:

> ". . . that no other seasonal employers in Alaska have been classified as seasonal, and Plaintiff has been discriminated against by that fact." (R. 201.)

We construe the appellee's argument, as accepted by the trial Court, as follows:

Chapter 99 requires, as a matter of law, that the Commission declare all employers whose payroll experience meets the 7(c)(1) formula to be seasonal. Hence, the Commission's failure to so declare the construction industry or any of its employers as seasonal between April 30, 1953 and July 30, 1953 (the latter date being the date plaintiff instituted suit herein), while declaring certain cannery employers to be seasonal during said period, constitutes unlawful discrimination. This has caused the fund to become seriously depleted, all to the irreparable damage of appellee, thereby entitling it to an injunction against the enforcement of Regulation No. 10.

It is appellant's contention that, merely because the fund may become depleted because of the Commission's refusal or failure to declare certain construction industry employers as seasonal, it does not follow that Regulation No. 10 should be enjoined.

Also, Regulation No. 10 merely sets seasonal periods for previously classified cannery employers. By itself, it classifies no one. In order to sustain the validity of its contention, which, if done, would still not have any bearing on the validity of Regulation No. 10, the appellee must show that Chapter 99 requires *all* employers whose payroll experience meets the 7(c)(1) definition be deemed seasonal employers. Under this view, the Commission's duty is merely to perform the clerical act of notifying employers of such determination. We think the following analysis will show that the Court erred in accepting this argument.

Does Chapter 99, by operation of law, classify all employers who meet the 7(c)(1) formula?

The following portion of Section 7(c)(2) seems to support a negative answer:

> "Seasonal Period and Duration of Determination. In establishing a seasonal period as contemplated herein, the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged.
>
> *"When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable* to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation." (Italics supplied.)

Following Section 7(c)(1), which defines a seasonal employer, the following language is employed, which appears to vest discretion in the Commission to determine what specific employer shall be declared seasonal:

> "No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission."

This language appears to support our contention that the legislature vested discretion in the Commission. We think the 7(c)(1) definition of a seasonal employer was intended to be a mere guide to the Commission in the exercise of its discretion in determining who is and who is not a seasonal employer. After read-

ing the *whole of Section 7,* it is fairly apparent that merely by defining what constitutes a seasonal employer, the legislature did not intend thereby to have every employer who met the mathematical formula automatically tagged as seasonal. Such a construction is impractical and does violence to other provisions of the law as hereinafter pointed out. (R. 228, 244.)

Furthermore, it was a physical impossibility for a Commission (which had its first meeting on August 6, 1953), to pass upon the seasonality status of the many thousands of Alaskan employers, construction and otherwise, between April 7 and July 30, 1953.

Therefore, it is difficult to perceive how it can be held that the appellee was discriminated against when it was literally impossible to classify *all* construction industry employers prior to the time appellee filed suit herein, i.e., July 30, 1953.

The Court's construction of Section 7 results in a repudiation of long established administrative practices under similar statutes since 1937. Since that year the various Commissions, as Mr. McLaughlin would have testified if permitted (R. 219), had acted upon the assumption that the statutes vested discretion in the Commission in determining what employers should be seasonally classified. This is only common sense, since there may be instances when a normally non-seasonal employer, due to a layoff or emergency, may meet the payroll decline definition. The phrase, "Until such determination by the Commission no occupation or industry shall be deemed seasonal," used since 1937,

in Section 51-5-2(c)(1), is virtually identical to that clause in Section 7 (c)(1) of Chapter 99 SLA 1953, which states: "No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission." Chapter 4 SLA 1937 Section 3(c)(1)(Extraordinary Session) also states:

> "As used in this sub-section the term 'seasonal industry' makes an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than forty weeks in a calendar year. The Commission shall after investigation and hearing, determine . . ."

In 1939, Chapter 4 was amended by Chapter 1 Section 12 of the SLA 1939 to read:

> ". . . 'Seasonal industry' means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than one year in length. The Commission shall, after investigation and hearing, determine . . ."

Under the trial Court's interpretation of Chapter 99, any employer who temporarily ceased operations for remodeling or retooling, for example, would, if his payroll decline met the 7(c)(1) definition as the result of such shutdowns, be by operation of law a seasonal employer. The Commission would therefore have no authority to grant relief to such an employer from the seasonal classification. We think the legislature did not intend such inflexibility. That is why it employed language stating that no employer shall

be deemed seasonal unless and until so determined by the Commission.

In view of the fact that the past Commissions have operated on the assumption that they had discretion in these matters, the utmost respect should be given to such long established administrative practices. 42 Am. Jur. Pub. Adm. Law, Secs. 77, 78. Further supporting the appellant's contention that the statute vests discretion in the Commission is that language in Section 7(c)(2) which states that:

> ". . . the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged."

If the District Court's decision that any employer who meets the 7(c)(1) definition *must* be declared seasonal is sustained, then this language would seem to be surplusage. In authorizing the Commission to consider data relating to the best practices of the industry, discretion is implied.

The Court has in effect ruled that, if any employer meets the statutory definition of seasonal employer, it must be seasonally classified. Under this theory the Commission need only secure the payroll record of the employer, match it with the statutory definition of a seasonal employer and thereupon notify him of his status. This is a mere mechanical procedure which does not take into consideration data relating to the best practices of the industry. Such a robot-type approach to the seasonality problem, which is indeed

involved and complicated, is completely foreign to the spirit of the statute. Mr. Moore, the construction industry representative, clearly demonstrated the fallacy of such a mechanical approach to the seasonality problem. (R. 244.)

It has been shown that the appellee requested to be classified as a seasonal employer, whereas construction industry employers have requested not to be. (R. 174, 217, 218.) This is not a case where one employer was selected from a class and thereupon arbitrarily classified against its will. Previous Commissions, after hearing evidence concerning the seasonality status of the construction industry, determined that it would not seasonally classify the same. (R. 126, 130, 142, 151, and pp. 28 and 29 of Defendant's Exhibit "E".)

II. *Did the determination and/or regulation classify the salmon industry on an industry-wide instead of an employer-unit basis?*

The following excerpt from the Court's opinion discloses that it erroneously construed the regulation as one that classified on an industry-wide basis:

> "It not only appears that the regulation ignores the mandate of the law that all employers and employing units be classified as seasonal and nonseasonal and the seasonal periods for each established, but also that the regulation classifies the canned salmon industry not by employers or units thereof, but by areas and open seasons as established by the Fish and Wildlife Service . . ." (R. 50.)

Appellee has again and again asserted as a ground for the invalidity of the regulation that the same designates the salmon industry as seasonal rather than individual cannery employers as seasonal.

The fact is that Regulation No. 10 designates no one as seasonal. It merely sets the seasonal periods during which previously determined seasonal employers must report their payroll earnings.

Examination of the following wording from the Regulation itself *conclusively proves this point:*

> "The Commission accordingly prescribes:
>
> "I. Seasonal Periods for the Calendar Year 1953 for *Certain Employers* Engaged in the Canning of Salmon Taken in the Operating Area Designated . . ."
>
> "II. Reporting by Seasonal Employers:
>
> "Employers *having been determined* by the Commission to be seasonal employers *and so notified* . . ." (Emphasis supplied.)

The declaration of the seasonality status of the appellee's seasonal determination herein was made on an individual basis. In accordance with Section 7(c)(2), the Commission issued a regulation specifying the seasonal periods during which benefit payments to the employees of these seasonal employers shall be made.

The District Court erred in accepting the appellee's argument that Regulation No. 10 declared the entire salmon industry instead of individual employers therein as seasonal. Regulation No. 10 itself is merely

the final step of the following three-step procedure in determining the seasonality status of various employers:

> Step 1. The gathering of the necessary data by the Commission, taking into consideration the best practices of the industry in determining who is seasonal;
>
> Step 2. Notifying the individual employer of his seasonal determination;
>
> Step 3. The promulgation of a regulation in accordance with Section 7(c)(2), below quoted, specifying the seasonal periods during which benefits shall be paid to the employees of previously seasonally determined employers:
>
> "When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation."

III. *Was Regulation No. 10 adopted without required legal notice and without affording the appellees an opportunity to be heard?*

The Court said that Regulation No. 10:

> ". . . was adopted without notice and without affording those concerned an opportunity to be heard, as prescribed by Section 51-1-11(b) . . ."

The Court no doubt meant 51-5-11(b) and not 51-1-11 (b). Section 51-5-11(b) states, in part:

> "*General and special rules* may be adopted, amended or rescinded by the Commission only after public hearing or opportunity to be heard thereon . . . Regulations may be adopted, amended, or rescinded by the Commission and *shall become effective in the manner and at the time prescribed by the Commission* . . ." (Italics supplied.)

It is apparent that the above section distinguishes between rules and regulations. Since Regulation No. 10 is in the latter category, the Commission may declare the same to be executed in the manner prescribed by the Commission as authorized by Section 51-5-11(b).

Section 7 of Chapter 99 employs the following language relative to hearings:

> "In establishing a seasonal period . . . the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged."

It appears, therefore, that hearings were not a condition precedent to the validity of the regulation, but were only necessary when the Commission lacked sufficient payroll data.

The plaintiff admitted receiving actual written notice of the regulation. (R. 32.) The Commission had previously held hearings concerning seasonality in the salmon industry and had in its files the payroll data necessary to determine the seasonality status of the various industry employers. (R. 181, 182.)

Reason No. 3: Is the possibility of a deadlocked Commission relevant on the question of the application of the exhaustion doctrine?

The Court disposed of the appellee's contention that it was excused from appealing to the Commission because it was always deadlocked, by the following statement:

> "The last contention may be disposed of by the observation that the application of the doctrine (administrative remedies) does not depend on what may be said in retrospect. Here, as in analogous situations, diligence is the criterion." (R. 48.)

Continuing further in its opinion, the Court stated:

> "While the fact that the Commission has been unable to function since its organization, because of the deadlock referred to, would ordinarily be irrelevant on the question of whether administrative remedies have been exhausted, it is nevertheless a circumstance . . . in determining whether the rule ought to be applied." (R. 51.)

We have failed to find any authorities that consider the fact of a deadlocked Commission as even a circumstance in the application of the doctrine. In *Oklahoma Pub. Welfare Comm. v. State,* 105 P. 2d 547, 551, it was held that the mere fact that the plaintiff thinks that an appeal would be futile is no reason to short-circuit administrative procedures. *Abelleira v. District Court of Appeal,* 109 P. 2d 942, 953. The Alaskan legislature intentionally set up a four-man

Commission. The legislature's reasons for such a Commission are as follows (pages 921-922 of the Senate Journal, 21st Session, 60th day):

> "The Governor finds fault with the judgment of the Legislature in creating a four-man Commission to consist of 2 representative of labor and 2 representatives of management. It is conceivable that deadlock might occur on some occasion in the promulgation or interpretation of regulations. All four members are charged with carrying out the mandates of law, and it is assumed that all members will apply themselves conscientiously in fulfilling this responsibility. As a matter of practice, it is well known that not all members attend all meetings of boards and commissions and it may be expected that, as frequently as not, a quorum of three members of the Commission will be transacting the business of the Commission. Experience shows that, as frequently as not, in the case of three or five man boards or commissions, one member may be absent leaving a quorum of even numbers, yet few complaints that the business of the Territory was brought to a standstill from such a condition have been heard."

In view of the fact that the legislature deliberately created such a Commission and considering the rule that alleged futility of appeal is no excuse for failing to exhaust administrative remedy, it would appear that the exhaustion doctrine applies, thereby precluding injunctive relief.

Reason No. 4: Is the matter of the remedy sought herein judicial rather than administrative?

The Court ruled that it was judicial:

> "Indeed the very nature of the problems presented poses the question whether the remedy is not judicial, rather than administrative, to which the doctrine of the exhaustion of remedies would not apply. In view of the circumstance of this case, I am of the opinion that the doctrine should not be applied. 39 Cornell Law Quarterly 285; Gonzales v. Williams, 192 U.S. 1; U. S. ex rel. DeLucia v. O'Donovan, 178 F.2d 876; Breiner v. Wallin, 79 F. Supp. 506, 507-8." (R. 51, 52.)

In 39 Cornell Law Quarterly 283, this pointed statement is made:

> ". . . the fact that the agency was incompetent to rule on the only action to which the petitioner objected was an important factor in excusing exhaustion." (*Tomlinson v. U.S.,* 94 F. Supp. 854.)

The appellee's complaint that the regulation was unrealistic would have no doubt been considered and resolved if the new Commission were only given an opportunity to pass upon the same. Instead, the appellee sought judicial relief even before the new Commission met. Evidence that the question herein is essentially administrative in nature and not judicial is manifested by the following statements of appellee:

> ". . . that the regulation does not clearly determine seasonal employment . . ." (Page 7 of appellee's complaint.)

> ". . . the plaintiff's interest in this case is to establish seasons in the salmon canning industry, which has been declared to be seasonal, which correspond with the actual season and the periods . . . for which contributions are made by the employer, without discrimination as to residence of employees . . ." (Pages 2 and 3 of plaintiff's Affidavit in Opposition to Defendant's Motion for Summary Judgment.)

It is therefore evident that all appellee seeks is to correct an allegedly improper regulation. This is most surely a question of fact which the Commission should first pass upon.

We can perceive of no one more capable of determining the appellee's desire to establish seasonal periods in the salmon industry that correspond to the actual seasons than the Commission itself. Thus, in accordance with the principle of the *Gonzales* case, the appellee should be required to first present its complaints to the Commission and then if dissatisfied with their decision, pursue a judicial appeal.

The Cornell article at page 285 further states:

> "The courts should be more ready to excuse exhaustion when the injury involves a basic personal right, than when a large corporation is claiming monetary loss."

In *Ex Parte Fabiani,* 105 F. Supp. 139 (E. D. Pa., 1952), the Court was of the opinion that a draft board acted in an arbitrary manner, without any basis in fact, and held that the petitioner was not precluded from a judicial review of the board's

action. In the case at bar, however, a large nonresident corporation, which neglected to initially present its complaints to the Commission, now seeks to invalidate a regulation that is designed to and in fact does preserve the trust fund. There is not even any board action for the Court to review herein.

As in the *Gonzales* case, the *DeLucia* decision condoned a short-circuit because, as stated at page 285 in the article, ". . . the injury to the complainant was a severe personal deprivation of rights . . ." Certainly herein the appellee is being deprived of no personal rights due to the enforcement of Regulation No. 10. The *United Fuel Gas Co.* and *Wallin* cases support the rule that exhaustion is excused when the administrative action is "blatantly wrong." In both of these cases it was observed that the action of the Commission was clearly out of bounds.

An examination of Regulation No. 10 discloses that it is in strict accordance with Section 7(c)(2) of Chapter 99, wherein the Commission is authorized to issue a regulation specifying the seasonal periods during which benefits shall be paid. That is precisely what Regulation No. 10 does. It, notwithstanding the trial Court's ruling, *does not* determine the seasonal classification, as such, of any employer, employing unit or industry. There is no factual or legal basis for the District Court's ruling that the regulation is in blatant nonconformity with the enabling statute, Section 7 of Chapter 99.

It is asserted on page 286 of the Cornell article that the Courts do take into account the obvious in-

validity of the agency action and excuse exhaustion when ". . . there is some reason for not exhausting, or some serious injury suffered . . ."

Appellee and intervenor, as heretofore demonstrated, will in no manner suffer injury by enforcement of Regulation No. 10. Only the appellee's seasonal employees will be deprived of benefits for unemployment incurred out of their normal season of employment, by the operation of Regulation No. 10.

Taking all the above factors into consideration, it appears that the matter of the remedy sought herein is administrative rather than judicial and falls within the framework of the following rule set forth in 42 Am. Jur., Pub. Adm. Law, Sec. 201, as follows:

> "Where statutory authority to grant a remedy is conferred upon an administrative tribunal as distinguished from a court in the traditional sense of the word, the remedy manifestly is administrative, within the meaning of the doctrine of exhaustion of remedies." Oklahoma Pub. Welfare Comm. v. State, 187 Okla. 654, 105 P. 2d 547.

ISSUE III.

THE TRIAL COURT COMMITTED SERIOUS ERROR IN JUDICIALLY NOTING THAT THE ALASKAN CONSTRUCTION INDUSTRY IS SEASONAL, SAVE KETCHIKAN AND VICINITY.

Point 1.

The prerequisites for judicial notice were not fulfilled.

The Court, from the bench, made the following ruling:

"... the court has taken judicial notice of the fact that the construction industry is seasonal." (R. 216.)

In its written opinion the Court stated:

"... it would take judicial notice of the fact that outside construction work in the Territory, except in Ketchikan and vicinity, is limited by weather to the period from May to October, and is, therefore, seasonal in fact." (R. 44, 45.)

The three material requisites that must be met in order to authorize judicial notice are set forth in 20 Am. Jur., Evidence, Sec. 17, as follows:

"(1) The matter must be a matter of common and general knowledge;

(2) it must be well and authoritatively settled and not doubtful and uncertain;

(3) and it must be known to be within the limits of the jurisdiction of the court."

In view of the previous Commission's finding and Mr. Moore's statement that neither the construction industry nor its employees are seasonal (R. 126, 228, 232, 241, 252 and pp. 28 and 29 of Exhibit "E"), it is difficult to understand how the common knowledge requirement was satisfied.

It also appears that Requirement No. 2 was not satisfied herein. Not only is the question of seasonality in the construction industry (outside construction included) not settled, but it can be said with a conservative sense of safety that the issue is one of notorious acrimony and disagreement. For example, compare the Court's statement (R. 213)

and Mr. Moore's testimony (R. 228). The prior Commission expressly found the construction industry, outside dirt removers included, not to be subject to seasonal classification. (R. 130, 151.) Appellant's offer of proof, if accepted, would have at the very least shown that honest and conscientious persons conversant with the problem feel that a sizeable portion of the construction industry is not seasonal in fact. (R. 224-228.) Yet, in the teeth of these considerations, the District Court took judicial notice that *all outside construction work in Alaska, save Ketchikan and vicinity, is seasonal in fact.* The effect of taking such notice was to excuse appellee from the impossible burden of showing that the construction industry, or a majority of its employers, are seasonal. The trial Court, therefore, appears to have committed prejudicial error.

Point 2.

Appellant's offer of proof, if accepted, would have shown that a substantial portion of the construction industry employers are not seasonal and that there exist valid reasons why they should not be seasonally classified.

As an examination of the pleadings indicates, the appellee's basic complaint was, initially, and throughout all preliminary proceedings, directed toward alleged discriminatory operation of Regulation No. 10 *within* the canned salmon industry, in that it allegedly discriminated in favor of non-residents over residents and failed to seasonally classify so-called "long season" employees while classifying "short season" employees. However, after the trial, the District Court permitted the appellee to amend its complaint to

allege that the Commission's failure to classify other seasonal employers in Alaska constitutes unlawful discrimination as against the cannery operators. (R. 201.) The appellant thereupon requested that it be given an opportunity to show why construction industry employers were not classified. (R. 202, 203). The Court refused this request by rejecting appellant's offer of proof, which, if considered, would have demonstrated that there exist valid reasons for not seasonally classifying construction industry employers. (R. 130, 228, 232, 241, 252; defendant's Exhibit "E", pp. 28, 29.) It would also have shown that the legislature intended to vest discretion in the Commission regarding seasonality classification and that Mr. McLaughlin's staff drafted Chapter 99 and that their basic intent was to vest discretion in the Commission. (R. 219.)

The reason for the Court's rejection can be traced to its interpretation of the statute that all allegedly seasonal employers must be classified and that the construction industry is seasonal and it is therefore impossible for anyone to show that it is not. This interpretation should not be sustained in the face of long established administrative practice to the contrary, findings of previous Commissions relative to the seasonal nature of the construction industry, and Mr. Moore's uncontroverted testimony that the construction industry, or at least numerous employers thereof, are not seasonal in fact.

CONCLUSION.

Alaska is plagued with the problem of how to prevent excessive unemployment payments to seasonal employees. If the Territory were required to pay full benefits to seasonal employees while they are normally unemployed during the winter season, the trust fund would soon be depleted.

To prevent such a result, the seasonality concept was devised. Under this plan seasonal employees are paid benefits only when unemployed during their normal season of work. This policy is designed to preserve the fund, since no payments will be made for unemployment occurring during the winter season.

In 1953, the Alaska legislature enacted Chapter 99 SLA 1953. Section 7 thereof embodied the seasonality principle. The Act differed from preceding seasonality statutes in approach only. Previously, the law provided that the Commission could determine seasonality status of employers on an area or industry-wide basis. Section 7 provides for a determination of seasonality on an individual unit or employer basis. For example, part of Section 7(c)(1) reads as follows:

> "No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission."

In order to carry out seasonality, the Commission, in June of 1953, through its acting executive director, sent notice to the appellee advising that it was determined to be a seasonal employer. On June 29, 1953, the executive director, representing the Commission,

issued Regulation No. 10. It specified the seasonal period during which benefits would be paid to seasonal employees, whose employers were previously determined to be seasonal. This regulation, as an act separate from the prior determination of seasonality, was issued pursuant to the statutory mandate found in Section 7(c)(2) of Chapter 99, which reads, in part, as follows:

> "When the Commission has found and determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries . . ."

The heart of the appellee's attack against the regulation appears to be two-fold.

First. The regulation is unrealistic in that it establishes benefit seasons in the salmon industry which do not correspond with the actual operational season.

Second. That no other allegedly seasonal employers in Alaska have been classified as seasonal and plaintiff has been discriminated against by that fact.

Section 7 of Chapter 99 explicitly sets forth the administrative remedy in cases where persons affected by the seasonal regulation are dissatisfied with the same. Appellee deliberately by-passed the Commission. It did not give that body an opportunity to consider the allegation that the regulation is factually unrealistic in its establishment of benefit seasons or whether other allegedly seasonal employers should be classified. Under these circumstances, it appears that

the doctrine of exhaustion applies, precluding the appellee from judicial relief.

The discrimination charge is without merit for at least two reasons.

First. Alaska law, particularly Section 7 of Chapter 99, is not a compulsory mandate that all employers who meet the statutory definition of a seasonal employer are seasonal employers in fact. The new law, as its predecessor, permits the Commission to exercise discretion classifying employers. Since such discretion exists, there can't possibly be discrimination under the facts of this case.

Second. An unreasonably short length of time elapsed between the effective date of Section 7, and the date appellee filed suit, in which to investigate and determine the seasonal status of all other Alaskan employers. Under appellee's theory the only manner by which the Commission could have avoided a charge of discrimination was to seasonally classify all other Alaskan employers at the same time it was classified. The unreasonableness of this position demonstrates its lack of merit.

The failure to prove threatened irreparable damage by either appellee or intervenor resulting from the enforcement of the regulation precludes equitable relief. The record discloses that the enforcement of the regulation not only preserves the fund, but enhances the possibility of appellee receiving experience rating credits. (R. 144, 154.)

By taking judicial notice that the Alaskan construction industry is seasonal, the Court in effect ruled that every single employer in the Alaskan outside construction industry, save Ketchikan and vicinity, is a seasonal employer as that term is defined by Section 7 of Chapter 99. The manifest error of such an arbitrary ruling becomes apparent by citing one out of many possible exceptions thereto, i.e., the year round construction of the Eklutna project near Anchorage. (R. 232.) In addition, this ruling, by fiat, declares as an undisputed fact a matter that is the subject of bitter controversy and on which reasonable men disagree.

For these reasons it is respectfully requested that the decree authorizing the permanent injunction be set aside and the injunction dissolved.

Dated, Juneau, Alaska,
January 21, 1955.

J. GERALD WILLIAMS,
Attorney General of Alaska,
EDWARD A. MERDES,
Assistant Attorney General of Alaska,
Attorneys for Appellant.

(Appendices "A" to "G" Follow.)

Appendices.

Appendix "A"

REGULATION 10.

ESTABLISHING SEASONAL PERIODS AND PROVIDING FOR PAYMENT OF BENEFITS TO SEASONAL WORKERS.

Section 51-5-2(c) Alaska Compiled Laws Annotated 1949 as amended by Section 7, Chapter 99, Laws of 1953, provides:

"(2) . . . When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation . . ."

The Commission accordingly prescribes:

I. SEASONAL PERIODS FOR THE CALENDAR YEAR 1953 FOR CERTAIN EMPLOYERS ENGAGED IN THE CANNING OF SALMON TAKEN IN THE OPERATING AREA DESIGNATED.

Operating Area[1]	Seasonal Inclusive Dates	Seasonal Code
Yukon	May 30 to September 5	19
Bristol Bay	June 20 to August 1	20
Alaska Peninsula and Cook Inlet	May 23 to August 8	21
Chignik and Kodiak	June 13 to August 15	22
Resurrection Bay	June 27 to October 3	23
Prince William Sound	July 12 to August 29	29
Copper River and Bering River	April 25 to September 26	24
Yakutat	May 30 to October 3	25
Southeastern:		
Icy Strait, Eastern (except Taku River and Port Snettisham) and Western Districts	June 13 to August 29	27
Stikine District, and Taku River and Port Snettisham in Eastern District	(May 2 to June 12	26
	(June 13 to August 29	27
	(August 30 to October 3	28
Sumner Strait, Clarence Strait, South Prince of Wales Island and Southern Districts	July 12 to August 29	29

[1]Operating Areas herein are as more particularly described in regulatory announcements of the U. S. Fish & Wildlife Service.

II. REPORTING BY SEASONAL EMPLOYERS.

Employers having been determined by the Commission to be seasonal employers and so notified shall re-

port the amount of wages payable to individuals in their employ within the inclusive dates of the seasonal period established by the Commission as distinguished from wages payable for employment before or after such established season.

III. BENEFIT PAYMENTS TO SEASONAL WORKERS.

A seasonal worker is one who has base period wage credits of which at least eighty percentum have been earned in seasonal employment. Benefits shall be payable to seasonal workers only on account of unemployment occurring during the seasonal period applicable to such unemployment as designated in paragraph I herein.

Pursuant to the appropriate provisions of the Alaska Employment Security Law (Section 51-5-1 to 20 ACLA 1949, as amended) and in accordance with the authority vested in me, I, John T. McLaughlin, the duly qualified and acting executive director of the Employment Security Commission of Alaska, do hereby adopt the foregoing regulation, designated as Regulation 10, and prescribe that the same shall take effect July 5, 1953, superseding former Regulation 10 dated October 16, 1952.

Dated at Juneau, Alaska, this twenty-ninth day of June, 1953.

John T. McLaughlin
Executive Director
Employment Security Commission
of Alaska

Appendix "B"

CHAPTER 5.

ALASKA UNEMPLOYMENT COMPENSATION LAW.

Section 51-5-1. *Definitions.*

"(f) 'Commission' means the Unemployment Compensation Commission established by this Act or any person to whom this Commission may delegate its powers and duties."

Section 51-5-2. *Benefits.*

"(c) Seasonal employment.

(1) As used in this subsection the term 'seasonal industry' means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than one year in length. The Commission shall, after investigation and hearing, determine, and may thereafter from time to time redetermine, the longest seasonal period or periods during which, by the best practice of the occupation or industry in question, operations are conducted. Until such determination by the Commission no occupation or industry shall be deemed seasonal."

Section 51-5-7. *Claims for benefits.*

"(h) *Appeal to Courts.* Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final thirty days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any

party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney employed by the Commission and designated by it for that purpose, or at the Commission's request by the Attorney General."

Section 51-5-11. *Administration.*

"(b) *Regulations: General and special rules.* General and special rules may be adopted, amended, or rescinded by the Commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given. General rules shall become effective thirty days after filing with the Secretary of the Territory and publication in one newspaper of general circulation in each of the four judicial divisions of the Territory for such period as the Commission may prescribe. Special rules shall become effective thirty days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission."

Appendix "C"

CHAPTER 4, SESSION LAWS OF ALASKA, 1937
(Extraordinary Session).

Section 3. *Benefits.*

"(c) Seasonal employment.

(1) As used in this subsection the term 'seasonal industry' means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than forty weeks in a calendar year. The Commission shall, after investigation and hearing, determine, and may thereafter from time to time redetermine, the longest seasonal period or periods during which, by the best practice of the occupation or industry in question, operations are conducted. Until such determination by the Commission, no occupation or industry shall be deemed seasonal."

Appendix "D"

CHAPTER 1, SESSION LAWS OF ALASKA, 1939.

"Section 12. That Chapter 4, Section 3(c)(1), Extraordinary Session Laws of Alaska, 1937, be amended to read as follows:

'Section 3(c)(1). As used in this subsection the term "seasonal industry" means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than one year in length. The Commission shall, after investigation and hearing, determine, and may thereafter from time to time redetermine, the longest seasonal period or periods during which, by the best practice of the occupation or industry in question, operations are conducted. Until such determination by the Commission no occupation or industry shall be deemed seasonal.' "

Appendix "E"

CHAPTER 82, SESSION LAWS OF ALASKA, 1953.
AN ACT

[H. B. 128]

To repeal Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska, 1949.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska, 1949, be and it is hereby repealed.

Section 51-5-10. Unemployment Compensation Commission.

(a) *Organization.* There is hereby created a Commission to be known as the Unemployment Compensation Commission of Alaska. The Commission shall consist of three members, who shall be appointed by the Governor, by and with the consent of the Legislature, as soon as possible after the passage and approval of this Act and thereafter when any vacancy occurs in its membership. During his term of membership on the Commission no member shall serve as an officer or committee member of any political party organization, and not more than two members of the Commission shall be members of the same political party. Each member shall hold office for a term of six years, except that:

(1) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and

(2) the term of office of the members first taking office after the date of enactment of this Act shall expire, one February 1, 1939, one February 1, 1941, and one February 1, 1943. The members of the Commission shall be Territorial officers and before entering upon the duties of their office shall take the oath of office prescribed for Territorial officers. The Governor may at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty or malfeasance in office.

Upon the expiration of the term of a member the Governor shall submit the name of his successor for confirmation by the Legislature then in session; if the Governor fail to submit such name the incumbent shall continue to hold office and shall continue to perform the duties thereof until his successor shall have been appointed and his appointment confirmed by the Legislature as in this Section provided, and no recess or interim appointment shall be made in such case.

(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Five Thousand Two Hundred and Fifty Dollars ($5,250.00) per annum, payable in equal monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be ap-

pointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.

(b) *Compensation of Commissioners.* One of the members of the Commission so appointed shall be the chairman of the Commission. The members of the Commission shall not receive any fixed salary but shall be paid at the rate of Ten Dollars ($10.00) per day plus necessary expenses while engaged in the actual performance of their duties but no commissioner shall in any event receive more than One Thousand Dollars ($1,000.00) salary in addition to expenses for any calendar year. The salaries of all commissioners shall be paid from the unemployment compensation administration fund. The chairman of the Commission shall be designated by the Governor.

(c) *Quorum.* Any two Commissioners shall constitute a quorum. No vacancy shall impair the right of the remaining Commissioners to exercise all of the powers of the Commission. (L Ex Sess 1937, ch 4, § 10, p 51; am L 1941, ch 40, §§ 24, 25, p 110; L 1945, ch 20, § 1, p 72, effective March 19, 1945.)

Appendix "F"

CHAPTER 83, SESSION LAWS OF ALASKA, 1953.
AN ACT

[H. B. 129]

To create an Employment Security Commission of Alaska.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. There is hereby created a commission to be known as the Employment Security Commission of Alaska. The Commission shall consist of four members, who shall be appointed by the Governor, by and with the consent of the legislature, in joint session of both houses, as soon as possible after passage and approval of this Act. Members of the Commission shall be residents of the Territory of Alaska and citizens of the United States, over the age of twenty-one years. Not more than two members of the Commission shall be of the same Political Party. Two members shall be representative of industry or management and two shall be representative of labor. Each member shall hold office for a term of six years, except that:

(1) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of that term; and if a vacancy occurs at a time when the legislature is not in session, through death, resignation, removal or disqualification, under this Act, a new member shall be appointed by the

Governor to fill the vacancy who shall have the qualifications herein prescribed and who shall hold office for the remainder of the term for which his predecessor was appointed; and

(2) The terms of office of the members first taking office after the date of the enactment of this Act shall begin on the date of their appointment and shall expire, one on February 1, 1955, one on February 1, 1957, one on February 1, 1959 and one of February 1, 1961. The members of the Commission shall be Territorial officers, and before entering upon the discharge of their duties, shall take such oaths of office as are prescribed for Territorial officers. The Governor may, at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance in office, or commission of a crime.

Upon the expiration of the term of a member, the Governor shall submit the name of a successor for confirmation by the legislature then in session; if the Governor does not submit such name, the incumbent shall continue to hold office and to perform the duties thereof until his successor shall be appointed and confirmed by the legislature, as in this section provided, and no recess or interim appointments shall be made in such cases.

(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Eight Thousand Five Hundred Dollars ($8,500.00) per annum, payable in equal

monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be appointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.

(b) One of the members of the Commission so appointed shall be chosen by all members as Chairman of the Commission. Members of the Commission shall be reimbursed for actual travel expenses and shall receive a per diem allowance for each day that they are away from home in connection with their official duties in carrying out the purpose of this Act. The reimbursement of all Commissioners shall be from the Employment Security Commission administration fund.

(c) Any three Commissioners shall constitute a quorum, and no vacancy shall impair the rights of the remaining Commissioners to exercise all the powers of the Commission.

Appendix "G"

CHAPTER 99, SESSION LAWS OF ALASKA, 1953.
AN ACT

"Section 5. That Sec. 51-5-2(b)(1) ACLA 1949, as amended by Chapter 11, SLA 1951; and Sec. 51-5-2 (d)(1), (2) and (3), ACLA 1949, are hereby repealed and a new section in lieu thereof is hereby enacted to read as follows:

(b)(1) Amount of Benefits. Subject to the other provisions of this Act benefits shall be payable to any eligible individual during the benefit year in accordance with the weekly benefit amount and the maximum benefits potentially payable shown in the following schedule for such base period wages shown in the schedule as are applicable to such individual: Provided, however, that said weekly benefit amount shall not exceed twenty dollars per week, and the said maximum benefits potentially payable shall not exceed four hundred dollars, for any individual during any benefit year if the balance in the fund is less than two million dollars on January first of the calendar year in which his benefit year begins . . ."

"Section 7. That Sec. 51-5-2(c) ACLA 1949 is hereby repealed and a new section in lieu thereof is hereby enacted to read as follows:

(c)(1) Seasonal Employer. As used in this section the term 'seasonal employer' means an employer or operating unit of an employer which because of the seasonal nature of its operations, reduces its employment to such an extent that its monthly payroll

for each of three consecutive months in each of two consecutive calendar or operating years immediately preceding the year for which the determination is made, is less than one-half the average monthly payroll for the three consecutive months of highest payroll in the same calendar or operating years. No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the commission. A successor in interest of a seasonal employer or operating unit shall be deemed seasonal upon the same basis as the predecessor unless determined otherwise by the Commission.

(2) Seasonal Period and Duration of Determination. In establishing a seasonal period as contemplated herein, the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged.

When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation.

Employers affected by such regulation shall report on forms provided by the Commission the wages payable to individuals in their employ during the inclusive dates of the seasonal period set by the Commission, as distinguished from wages payable for employment before or after such seasonal period.

Prior to June thirtieth each year, a written determination declaring the employer to be seasonal and specifying the period of seasonal operation shall be forwarded to the employer involved. Notice of the determined season shall be forwarded to any representative of individuals in the employment of such employer and of whom the Commission has knowledge. Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party may appeal from such determination. An appeal shall be made to the Commission stating therein why the determination is appealed. After affording the parties a reasonable opportunity to submit briefs with respect to the determination appealed from, the Commission may affirm, modify, or set aside such determination, and such action of the Commission shall be deemed conclusive unless further appeal is initiated as provided in Section 51-5-7(h) herein.

(3) Seasonal Employment Defined. 'Seasonal employment' means all employment for a seasonal employer or operating unit within the season determined by the Commission as its operating season. All wages payable by a seasonal employer within such operating season shall be deemed seasonal wages.

(4) Operating Unit. For the purposes of this Act relating to seasonal employment, an 'operating unit' is any unit of an employer's business which frequently is conducted as a separate and independent operation.

(5) Seasonal Worker. 'Seasonal worker' means an individual who has base period wage credits of which at least eighty percentum have been earned in seasonal employment.

(6) Benefit Payments to Seasonal Workers. When the Commission has designated the operations of an employer or an operating unit as seasonal, then benefits shall be payable to seasonal workers employed thereby only on account of unemployment occurring during the regular period of such seasonal employment as designated in Section 51-5-2(c)(2)."